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Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

No. 04-1330

IN THE

Supreme Court of the United States

BERNADETTE FULLER, and all others similarly situated,

Petitioners,

v.

INSTINET, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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1. Respondent brief (hereinafter "ResBr"), disregards and avoids the basis of this law action; at Instinet, Inc. there were:[1]

A. 66 Vice-Presidents at Instinet
   1. Zero "0" black Vice-Presidents
   2. One "1" Hispanic Vice-President.[2]

B. 62 White Vice-Presidents at Instinet received on an average $148,661.
   1. The one ("1") Hispanic Vice President was paid less than one-half of the white vice-presidents: $70,000.

C. Of the 80 highest paid employees at Instinet:
   1. There was one ("1") black.
   2. There was no Hispanic of the 80 highest paid.

D. Of the 273 employees earning more than $100,000;
   1. There were only 6 blacks
   2. There were only 4 Hispanics.

E. Of the 145 managers:
   1. Black managers made 13% less than white managers
   2. Hispanic managers made 21% less than white managers.

F. The first 34 non-minority managers made between 200,000 and 100,000.
   1. The highest paid minority Instinet manager (35th overall) was Hispanic and made only 100,000.
   2. The highest paid black did not even make 100,000.

2. While attempting to discredit Petitioner's argument, Respondent never explains why Petitioners demonstration that for every job title (vice-presidents and assortment of managers)

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[1] It is particularly significant to remember that the district court refused to consider Hispanic statistics because the court believed that Ms. Fuller, a black, could not represent Hispanics. *Please see* PetBr at 4-5. The Court of Appeals *reversed* the district court but the damage could not be undone.

[2] Petitioners at the certification court submitted several Affidavits from their Expert, Richard Faust, and a book of diagrams and charts demonstrating the overwhelming discrimination statistics stated here.

blacks and Hispanics were paid significantly less than their white counterparts.[3]

3. Respondent never addresses the uncontroverted fact that the Court of Appeals *reversed*[4] the District Court when the District Court in error denied Petitioner, Ms. Fuller's, representation of blacks and Hispanics and stated that she could only represent blacks. That argument can not be held to be a harmless error because it automatically threw out all argument and statistics made by Petitioner, Ms. Fuller, on the behalf of Hispanics as well as blacks.

4. Respondent argues (ResBr4) abstractly that the Court must only consider the most obvious form of retaliation; money or position. Petitioner, Ms. Fuller, claims, however, that Instinet has employed a more insidious way of punishing Ms. Fuller for whistle-blowing. Respondent's evaluation, which took place only days after her attorneys contacted Instinet on her behalf, was scathing and derogatory (PetBrief at 25) in a retaliatory manner which made rising within Instinet virtually impossible and made it impossible to get a favorable recommendation to a new job with a new company. Moreover all previous evaluations at Instinet (which without exception were excellent) were done at the end of the year. Instinet created a special evaluation for Ms. Fuller in the middle of the year. At a minimum this was a jury question and not one for summary judgment: whether there was cause and effect of Ms. Fuller's whistle blowing and days later (not months or years later) Instinet conducting for the first time in its history, doing a mid-year evaluation.

5. Respondent, with actual knowledge of this case makes several strange arguments.

A. It states several times that Petitioners waited too long to make their arguments ("Ten months after") (PetBr2) and ("and ten months later") (PetBr4). It is uncontroverted that

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[3] Respondent never takes issue with the statistics presented by Petitioners.

[4] Please see Petitioner's Brief, pp.4-5, Court of Appeals reversing district court.

Petitioners at no time asked for a delay at any time in this action.[5]

In Respondent's footnote 1 (PetBr5-6) it states that this action has taken so long that it would not be appropriate to give notice "about a certification denial that occurred over three years ago." It goes on to say that the statute of limitations has passed on all claims in the same footnote. This is just a mistake on Respondent's part of basic first year law subjects. No statute can run while the issue on appeal is being judged by a higher court. There is no final judgment on any issue before this United States Supreme Court.

This Court in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983) held;

> The principal purposes of the class-action procedure — promotion of efficiency and economy of litigation — would thereby be frustrated. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974) To protect the policies behind the class-action procedure, the Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id., at 554.*
>
> * * *
>
> The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. Much

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[5] Petitioner attempted to bring an interlocutory appeal within approximately 15 days after certification denial. (12/15/01) Respondent opposed Petitioner's appeal on jurisdictional grounds that appeal was not brought within 10 days. USCA granted Respondent's motion to dismiss. (5/31/02) Current appeal brought under final judgment. It is hollow indeed for Respondent to argue that Petitioner delayed this action when without its opposition the certification appeal could have been heard early in 2002.

> the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification. There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene. The forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available. Moreover, permission to intervene might be refused for reasons wholly unrelated to the merits of the claim. n4 A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

Id. at 350-51.

Respondent fails to advise this Court that the district court took almost two and a half years to render two decisions that had nothing to do with Petitioner, due to the court's busy schedule. (PetBr5-fn6).

I. Respondent in its brief fails to understand Culver's premise, that underlying Rule 23 is Notice under due process in accord with the constitution and its amendments.

A. Respondent continues to support the Second Circuit which is clearly at odds with the Seventh Circuit.

Respondent clearly in its brief states that the Second Circuit is at odds with the Seventh Circuit. (ResBr6-7) To prop up its claim it relies on Second Circuit district court opinions that never analyze why the decision states what it does. As Petitioners stated in their brief, the Second Circuit follows what it does because it follows it – and nothing more. (PetBr6-7) Respondent also quotes secondary authority which merely restates the law of the Second Circuit.

Similarly Respondent quotes *Dolgow v. Anderson*, 53 F.R.D.664, 690 (EDNY 1971) ("Since the dismissal of the class action is on the merits, no notice to class members is required . . .") (ResBr7).This Court only two years later (1974) stated the opposite. That Rule 23 only requires that Rule 23 requirements be met.[6] Respondent goes on to state that Rule 23(e) is "settled law." If anything it is unsettled law and the Second Circuit has never analyzed Rule 23 law while upholding district courts' law. The Second Circuit is at odds with the Seventh Circuit despite the assertions to the contrary by counsel for Respondent.[7]

It certainly rings truer that a statute that is consistent with Due Process and Notice is presumed to be constitutionally preferred over a statute where Due Process and Notice is not considered. It is for that very constitutional reason that the Seventh Circuit decided Culver in the manner in which it did.

Culver v. City of Milwaukee, 277 F.3d 908 (2002), which also relied on the Fifth Amendment, ((PetBr10) states,

> Stated otherwise, the context in which "class" is used in Rule 23(e) indicates that it is not limited to a certified class. Even cases that refuse to apply Rule 23(e) to putative class actions require notice to the members of the putative class if it seems clear that otherwise their interests would be harmed. E.g., *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975)

Culver at 914-5.

Respondent in error attempts to make a point that no one knew that they were in a class action so they not need receive notice. First, this fails because the Seventh Circuit states the opposite.[8] Second, Ms. Fuller discussed the action with several

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[6] "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)

[7] Respondent states, "There is no split of Authority in the Circuits . . . (ResBr8 Heading) *Culver* states the opposite of what Respondent would have this Court believe."

[8] "He thought they probably were unaware of the suit and therefore (Cont'd)

of her co-workers, of which Instinet was aware. Third, Instinet interviewed several of Ms. Fuller's co-workers. Fourth, Reuters News carried the story of the class action. Fifth, and of the most importance, is that everyone in the class has a property right enabling them to go to Court and initiate an action on their own behalf for at least 90 days after final judgment of this Court. It would be senseless for citizens to have a property right and for the Court to deny them access of knowledge of that right. It would make no sense. Notice is a fundamental right under the Constitution and its Amendments and a key component under Due Process.

B. That the action before this Court may create additional responsibility for the Court system to produce Notice where feasible, should not be used as a deterrent against the attainment of Due Process.

Respondent forcefully argues[9] that notice could be used frivolously. Petitioners ask that the whole movement and progression toward racial equality be considered. That is from slaves to a war based on slavery to the Civil Rights Act of 1875 to the 1887 Florida law causing separate railroad accommodations to Louisiana in 1891 to Tourgée arguing "separate but equal" was unconstitutional to continuing to the Supreme Court with *Plessy v. Ferguson* to *Brown v. Board of Education* to the present. All actions whose final motives were total equality had "practical implications."

II. Under Bazemore, blacks and hispanics that receive less pay for the same position in alarming proportions suffice for probativeness and admissibility.

Respondent chooses not to understand this Court's decision in *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (*per curiam*)[10] and misinterprets its cited case (ResBr13) *Morgan v. United States Postal Serv. Of Am. Inc.*, No. 04-1123, *cert. denied*, 2005 WL 420786 (2005); 380 F.3d 459 (8th Cir. 2003) and failed

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(Cont'd)

would not be prejudiced by its demise."Probably" is not good enough; it implies that some class members may well have been prejudiced. Please see, (PetBr10)

[9] "A requirement of notice following the denial of class certification would have far-reaching and problematic practical implications." (ResBr7)

[10] *Please see* PetBr.15-16, quotes from *Bazemore v. Friday*.

to understand that *Morgan* had many factors and many were too subjective to have the court order certification. In *Morgan*, there were three claims; upward mobility, workings conditions and pay. It was difficult for Plaintiffs to prove upward mobility and working conditions because admittedly their action only applied to approximately one-half of UPS. As far as pay was concerned, the Morgan Plaintiffs' expert admitted[11] that there might not be a pay discrepancy. Even so the Court was a split appeals decision with regard to pay.

The Eighth Circuit[12] in its *Morgan* opinion relied on *Daubert's* reliability test. In *Kumho* this Court further elaborated on *Daubert*. See generally Federal Judicial Center, *Reference Manual on Scientific Evidence 21* (2d ed. 2000) (observing that in *Kumho Tire* the Supreme Court was "less absorbed . . . in formulating general rules for assessing reliability . . . and more concerned about directing judges to concentrate on 'the particular circumstances of the particular case at issue.' This flexible, nondoctrinaire approach is faithful to the intention of the drafters of the Federal Rules of Evidence [].").

Petitioners ask the Court to take a fresh look at the evidence (statistics) above and not denied by Respondents and find that the numbers presented are so overwhelming in every category that they stand rigidly for the fact that they could not have occurred without discrimination.[13] A court has the flexibility (*id.*) to identify and separate those actions of which the racial make-up of salaries and pay in relationship to race demonstrate that those numbers on their own suffice in order to certify. Factors of discrimination should be decided on a case by case basis (as indeed, all cases are decided).[14]

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[11] "No statistically significant disparity between white and black pay existed." *Morgan* at 462.

[12] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)

[13] The Court may never need to offer its decision on whether notice should be provided for a class denied certification, if it finds that the evidence before the Court, presents sufficient evidence to sustain class certification.

[14] Surprisingly, (ResBr.10) Respondent attempts to paint similarities between the present case and *General Tel. Co. v. Falcon*, 457 U.S. 147, 155

(Cont'd)

A. Respondent chooses not to understand that Bazemore supports this exact type of action.

The question for the Court is if certain statistical numbers jump out at you would that be enough. If there are 66 Vice-Presidents and there are no blacks and only one Hispanic is that discrimination? The district court held, that without other factors such as "educational level, prior work experience and years of service at Instinet" (App.C.at 26a) the statistics were not probative. But what would the additional factors prove? Would it lessen the force of the presented statistics? If Instinet paid the one Hispanic Vice-President less than one-half of all the other vice-presidents does this begin to meet *Bazemore's* requirements? Instinet could not pay black vice-presidents less because there were no blacks to pay less to.

What about the fact that of the eighty highest paid there was only one black and no Hispanics? What if we did not have each person's educational background, does this mean that blacks and Hispanics are not smart enough and don't have the proper education? Does it suggest that there are no educated black or Hispanics in New York City or that Instinet believes that even though blacks and Hispanics may graduate from schools such as Columbia and NYU that they still are not educated sufficiently to be hired and advance at Instinet? Petitioners respectfully suggest to the Court that the only way that these numbers are off as much as they are is simply — with purposeful discrimination.[15]

(Cont'd)

(1982). *Falcon,* however, was a strictly hiring circumstance. The U.S. Supreme Court reversed the lower Court's certification because the lead plaintiffs' statistics demonstrated virtually no discrimination. ("The record shows that there is no support for the class claim. Respondent's own statistics show that 7.7% of those hired by petitioner between 1972 and 1976 were Mexican-American while the relevant labor force was 5.2% Mexican-American.") At 33. (C.J.Burger concurring)

[15] *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 340 (1977) ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.")

Instinet cannot be left to hide behind an "other factors" defense when what is demonstrated under *Bazemore* is sufficient. Doesn't this mean that *Bazemore* would agree to these numbers as being acceptable? There are too many instances that suggest discriminatory practice at Instinet that do not allow it to hide because all the factors do not appear to be present. At Instinet there are too many "telltale signs of discrimination."

The District Court's limited analysis was particularly damaging for the class because "[s]tatistics alone can make out a prima facie case of discrimination if the statistics reveal "a gross disparity in [the] treatment of workers based on race." *Lopez v. Laborers Int'l Union*, 987 F.2d 1210, 1214 (5th Cir. 1993).

III. 42 U.S.C. § 1981(c)'s impairment clause has at all times been before the Court.

It is implausible that the Respondent is not aware that "retaliation law" is based upon and derived from a statute. The statute is 42 U.S.C. § 1981(c). Whenever retaliation law is applied they are speaking of § 1981(c).[16] A court did not conclude that if a company punished a citizen for bringing a discrimination action that they should be punished – and the punishment should be called retaliation law. Just the opposite is true. The statute came first and the Courts attempted to find criteria to uphold the statute. Not the other way around. There is nothing wrong with the criteria that has been evolved by the Courts but when it is demonstrated to the courts that it is possible for a company to find a loophole in the law which would enable a company who has broken the law and who has punished whistle-blowers, to escape unpunished, courts must first read the statute[17] and then decide if the criteria is useful in the case at hand.

The statute 42 U.S.C. § 1981(c). is clear. The word impairment means simply impairment.

Respondent tosses-out expressions like "well-settled" (ResBr.14) and that it was surprised to learn for the first time

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[16] *See* West and Lexis for cases under 1981(c).Under "Retaliation" cases cite 42 U.S.C. § 1981(c).

[17] *Please see* Frankfurter, *Some Reflections on the Reading of Statutes* (PetBr.23-24).

at this Court that retaliation is based upon a statute. It is not believable.

Respondent states that the reviews postdate her challenging Instinet's discrimination. (ResBr.15,f5) Instinet's attorneys misrepresent to this Court the dates of whistle-blowing and its effect. What Respondent calls "only a small excerpt" from Ms. Fuller's August 16, 1999 review was from her direct superior. (ResBr.15,f5)

Chronological Order of Retaliation:

a. Ms. Fuller's excellent year-end review by her superior, Linda Giordano (12/98)
b. Bassias & Jaffe on Ms. Fuller's behalf wrote a discrimination letter to the President of Instinet, Doug Atkin. July 27, 1999 which he probably received about August 1, 1999.
c. For the first time Instinet conducted a midyear review, August 16, 1999 and gave Ms. Fuller a derogatory and scathing review. Review by Fuller's supervisor, Linda Giordano.

The law of this action should not be a roadmap for companies and for those who write and lecture on the subject how to punish whistle blowers and not be punished for their wrongdoings. In Petitioner's brief it was stated that Ms. Fuller for her protected activity under 42 U.S.C. § 1981 was made a *dead* employee. (PetBr.22) Companies should not believe that they can get around § 1981 punishment if they place into an employee's file and an evaluation review so bad that the employee would in effect be a dead employee. No where to go within the company and without expectation of another company to hire her or him. Added to the advisement to the company would be, make certain not to demote the employee and make certain to pay the regular bonus. (PetBr.24-25)

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of the matter.

Respectfully submitted,

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